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No. 92-1803

In The

Supreme Court of the United States

October Term, 1992

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Petitioner,

v.

McDONNELL DOUGLAS CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The Second Appellate District, Division One

PETITIONERS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. THE RECORD SHOWS THAT AEROMEXICO NEVER USED AM MEX INTERNATIONAL AS ITS FREIGHT FORWARDER WITH RESPECT TO THE TRANSACTIONS IN ISSUE 2

II. IT IS THE OBLIGATION TO EXPORT NOT THE ALLEGED LENGTH OF DELAY WHICH DETERMINES WHETHER AN ITEM IS IN THE CONSTITUTIONALLY PROTECTED EXPORT STREAM 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

A.G. Spalding & Bros. v. Edwards, 262 U.S. 66 (1923) . . .4, 5

Carson Petroleum Co. v. Vital, 279 U.S. 95 (1929) 4

Coe v. Errol, 116 U.S. 517 (1886). 4, 5

Empresa Siderugica S.A. v. Co. of Merced, 337 U.S. 154 (1949). 4

Joy Oil Co. v. State Tax Comm'n., 337 U.S. 286 (1949) 4

Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946) 4, 5

RULES

S.Ct. R. 15. 1

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INTRODUCTION

Pursuant to Supreme Court Rule 15, the Petitioner files this Reply to Respondent's Brief in Opposition to the Petitioner for A Writ of Certiorari. The purpose of this reply is to clarify new issues raised directly and by innuendo in Respondent's Opposition Brief.

ARGUMENT

I.

THE RECORD SHOWS THAT AEROMEXICO NEVER USED AM MEX INTERNATIONAL AS ITS FREIGHT FORWARDER WITH RESPECT TO THE TRANSACTIONS IN ISSUE

Rather than discussing what actually transpired with respect to the transaction in question the Respondent discusses what "typically occurs" with respect to the delivery of goods to Mexico.[1] In an attempt to convince the Court that the parts in question were exports immune from state sales tax because they were delivered to a freight forwarder the Respondent states that:

> Aeromexico used AM MEX International as its freight forwarder at the international border, San Ysidro, to make the truck transfers to Mexican trucks. Aeromexico used AM MEX's expertise in U.S. and Mexican customs regulations and fees.[2]"

Despite the claimed expertise possessed by AM MEX International with respect to U.S. and Mexican customs fees and regulations the record clearly shows that MDC's own witness testified at trial that all AM MEX International did was to lend its San Ysidro facilities to Aeromexico employees. (R.T. 35.)[3] The goods were never

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[1] See Respondent's Brief In Opposition at p. 2.

[2] Respondent's Brief In Opposition p. 2.

[3] Q. "So actually, if I understand your testimony, Mr. Scolari, the party who actually received the goods at San Ysidro was Aeromexico and not AM-MEX, is that correct?

received by freight forwarder AM MEX International in San Ysidro, California in preparation for their journey outside the United States. The parts were received by purchaser Aeromexico in San Ysidro who merely used the facilities of AM MEX[4]. Other than lending their facilities to Aeromexico employees stationed in San Ysidro AM MEX International had absolutely nothing to do with the parts in question which the taxpayer claims to be exempt from state sales tax because they allegedly were exports[5]. Despite the Respondent's assertion that there was merely a "48 hour delay" in exporting the goods to Mexico[6] the facts also indicate that there was no existing contract or legal obligation to export the parts to Mexico[7] when they arrived at San Ysidro despite the fact that the goods

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A. In our facilities, that is correct.

Q. So, in essence, all Aeromexico did was to use your facilities, isn't that correct, to take care of the transportation of the goods from San Ysidro to – across the border?

A. That is correct." (R.T. 35.)

[4] Q. "So actually, if I understand your testimony, Mr. Scolari, the party who actually received the goods at San Ysidro was Aeromexico and not AM-MEX, is that correct?

A. That is correct." (R.T. 35.)

[5] The First Amended Stipulation of Facts entered into between the parties specifically states in pertinent part that:

" . . . Aeromexico used AM MEX International's facilities . . . " (1st Amend. Stip. Facts ¶ 16, R.T. 26.)

[6] Respondent's Brief In Opposition at p. i.

[7] Q. "Did AM-MEX have any type of contract with Aeromexico with respect to transporting the goods from San Ysidro to Mexico?

A. Not at that time, no. We do now." (R.T. 35.)

might have been clearly marked, "for export to Mexico"[8] San Ysidro was the final destination of the goods. Under these facts the parts were not immune from their "share of costs of local services." *Joy Oil Co. v. State Tax Comm'n.*, 337 U.S. 286, 288 (1949)

II.

IT IS THE OBLIGATION TO EXPORT NOT THE ALLEGED LENGTH OF DELAY WHICH DETERMINES WHETHER AN ITEM IS IN THE CONSTITUTIONALLY PROTECTED EXPORT STREAM

Respondent's brief in opposition cites numerous cases where this Court has correctly concluded that a brief detention of an item in state does not place it outside the constitutionally protected export stream[9]. The factor present in all of those cases which is nonexistent in this case is the existence of a legal obligation to export the

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[8] The record reflects that bills of lading were issued both at Long Beach and San Ysidro. (R.T. 114.) The fact that the parts were marked "Export To Mexico" on the bills of lading issued at San Ysidro is not surprising since the trial court also found that, "all customs arrangements for importing into Mexico were made after shipment had been made to San Ysidro". (R.T. 114.) The decision of the Court of Appeals also recognizes this. (Appendix B9.)

[9] *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946); *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923); *Carson Petroleum Co. v. Vital*, 279 U.S. 95 (1929); *Empresa Siderugica S.A. v. Co. of Merced*, 337 U.S. 154 (1949); *Coe v. Errol*, 116 U.S. 517 (1886); *Joy Oil v. State Tax Comm.*, 337 U.S. 286 (1949). Cited at pp. 6 and 7 of Respondent's Brief In Opposition.

items which were taxed[10]. It was not a break in the export stream which caused the parts to be taxable but rather the absence of "certainty of foreign destination" which precluded the parts from ever entering the export stream until they left San Ysidro, California. (C.T. 113, 114.) Neither the Court of Appeals nor the Respondent explain how "certainty of foreign destination" was plain when the purchaser obtained title and possession to the parts in California giving them complete control over the item and effectively making it a "part of the general mass of property within the State, subject, as such, to its jurisdiction, and to taxation in the usual way . . . " *Coe v. Errol*, 116 U.S. 517, 525 (1886)[11].

CONCLUSION

Respondent does not dispute the facts underlying the transactions in question as set forth in Petitioner's Petition for Writ of Certiorari. Based on the Court of Appeals' misapplication of law interpreting the Import-Export Clause of the United States Constitution to those undisputed facts this Court should grant summary reversal, or, in the alternative issue a writ of certiorari to review the

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[10] Respondent incorrectly asserts at footnote 4 of their brief in opposition that a test similar to what they refer to as the "legal obligation" test was rejected in *Spalding* and *Richfield*. Those cases are devoid of any such assertion.

[11] After listening to the evidence the trial court concluded that "all customs arrangements for importing into Mexico were made after the shipment had been made to San Ysidro." (C.T. 114.)

opinion and judgment of the California Court of Appeal, Second Appellate District.

Respectfully submitted,

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